

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Accelerated Docket for Complaint) CC Docket No. 96-238
Proceedings)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

BellSouth Corporation,¹ on behalf of itself and its affiliated companies, by counsel, files its comments to the Public Notice in this docket seeking "additional comment on issues relating to the possible alternative forms of complaint adjudication"² under the Commission's new formal complaint rules.³

INTRODUCTION

Over time the Commission has been required by statute to resolve certain types of complaints and formal complaints within specific, abbreviated, deadlines. Most recently the Commission adopted formal complaint procedures in this docket to facilitate resolving all formal complaints within five months. In doing so, the Commission pruned its procedures to eliminate any unnecessary delay to the extent that even the service of pleadings has been made more

¹ BellSouth Corporation (BSC) is a publicly-traded Georgia corporation that holds the stock of companies which offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

² *Common Carrier Bureau Seeks Comment Regarding Accelerated Docket For Complaint Proceedings*, CC Docket No. 96-238, Public Notice DA 97-2178 (December 12, 1997) at 2.

³ *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Report & Order, (November 25, 1997 (Complaint R&O)).

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efficient in light of new technologies. The next logical step is to garner experience under these new rules, not to create a subset of exception cases that would be subject to still different rules. While the Public Notice raises some interesting procedural innovations, such innovations are unlikely to afford parties a reasonable opportunity for fair and impartial adjudication and therefore should not supplant the rules that the Commission has very carefully reconsidered only recently. These innovations should instead be made available, where appropriate, as voluntary options within the context of the Commission's current rules.

I. THE COMMISSION SHOULD NOT ISSUE FINAL RULES WITHOUT A FURTHER RULEMAKING PROCEEDING.

In seeking comments through a Public Notice, the Commission has not proposed any specific rules or amendments to existing rules. Therefore, BellSouth assumes that the Commission is using this expedited proceeding (with no reply comments) to gather information from which a subsequent "recommendation" from the Enforcement Task Force to the Common Carrier Bureau may be generated.⁴ The notion postulated in the Public Notice of conducting complete, trial type proceedings within a 60 day period as an alternative to the Commission's current formal complaint procedures appears unworkable. The specific proposals discussed in the Public Notice make it clear that, in order to conduct a trial type proceeding within 60 days, the minimum due process rights, as well as rights guaranteed by the Administrative Procedures

⁴ Complaint R&O at ¶ 5. Although the Commission there stated that any such recommendation may form the basis for a subsequent Report and Order to be considered by the Commission at a later date, BellSouth assumes that before the Commission adopts any rules it will comply with the requirements of the Administrative Procedures Act and afford parties that may be affected by such proposed rules the opportunity to comment on such rules in a notice and comment Rulemaking.

Act, would be sacrificed. Nothing in the Communications Act requires the Commission to conduct trial type proceedings within 60 days.

If the Commission nevertheless were to consider proceeding with a rulemaking to adopt such a procedure as a hearing-style alternative to its recently revised formal complaint procedures, the procedure adopted should be voluntary for both the complainant and defendant. If either party objects, the Commission's current formal complaint rules then in effect should apply. The "mini-trial" proposal should therefore be considered as a type of Alternate Dispute Resolution ("ADR") that is available if both parties desire a quick determination of the staff's opinion regarding liability. While such a determination may be extremely useful in facilitating settlement of disputes, it cannot substitute for a procedure that is consistent with requirements of due process of law and judicial fairness in formal adjudication.

II. THERE IS NO NEED FOR A MANDATORY ACCELERATED DOCKET

Even formal complaints which are not subject to a statutory five month resolution deadline are subject to Commission rules that were recently streamlined to permit final agency action within five months, even where disputed issues of fact have been referred on delegated authority to Administrative Law Judges ("ALJs"). Further, Congress has specifically required the resolution of certain kinds of complaints in even less than five months.⁵ These are presumptively the only kinds of cases that Congress believes need to be given priority and that may require a different set of rules. In light of this, the effort to identify a new category of hypothetical future disputes that may require different procedures seems an inefficient use of the Commission's resources.

⁵ 47 U.S.C. §§ 260(b), 271(d)(6)(B), 275(c).

Complainants have long been able to bring motions for expedited relief before the Commission. If the facts of any particular case will not support expedited relief, then a five month resolution period should be more than sufficient.⁶ The Commission's resources would be better spent deciding current pending complaints subject to existing resolution deadline requirements, or in analyzing the efficacy of the recently reformed formal complaint rules, than creating new categories of complaints subject to newer, shorter deadlines that are not required by statute.

In any event, the type of accelerated docket described in the Public Notice would be of limited usefulness to the industry. Most disputes involving competitive issues in the rapidly evolving telecommunications industry are likely to involve highly technical issues and be extremely fact specific. The short-cut procedures, with their inevitable limitation on the ability of the parties to thoroughly present evidence, are not likely to be effective in resolving complex disputes. The Commission's existing formal complaint rules are already highly truncated, and any further reduction in the ability of the parties to present evidence is likely to fail to provide due process of law.

BellSouth knows of no specific events, general industry trends or particular categories of disputes that cannot be adequately handled through the Commission's current formal complaint process with its newly streamlined rules (including, importantly, the new ability of the Common Carrier Bureau to designate evidentiary disputes for hearing before experienced ALJs in a way that will not slow down the complaint process).⁷ the Commission's informal complaint

⁶ Of course, nothing prevents the Commission from actually rendering a decision in any contested case in less than five months.

⁷ Formal Complaint R&O, ¶¶ 135 - 137.

process,⁸ the Commission's pole attachment complaint procedures,⁹ existing state regulatory hearing procedures, and state and federal courts of law.¹⁰ In addition, BellSouth is a signatory to the CPR Corporate Policy Statement on Alternatives to Litigation, as are a number of other companies that provide telecommunications services.¹¹ These companies have agreed to the CPR Corporate Pledge, which obliges subscribing companies to seriously explore negotiation, mediation or other ADR processes in conflicts arising with other signatories before pursuing full-scale litigation.¹²

III. MINI-TRIALS CAN BE AN EFFECTIVE TOOL IN ADR OR IN HEARINGS ON DESIGNATED ISSUES.

Mini-trials can be an effective tool in a voluntary ADR setting for helping parties evaluate the strength and credibility of their cases, and perhaps even resolving disputes, but they are no substitute for a full factual presentation of evidence. In the context of formal complaints such processes cannot be used without the full consent of the parties involved to adjudicate or

⁸ 47 C.F.R. §§ 1.716 -18.

⁹ 47 C.F.R. §§ 1.1401 -16..

¹⁰ BellSouth does not doubt for a moment that the Commission's solicitation for information about "specific events, general industry trends or particular categories of disputes" will result in an avalanche of the usual broadbrush complaints against incumbent local exchange carriers, and their affiliates, generally brought by counsel for vaguely named trade associations on behalf of unidentified constituent entities. Yet such broadbrush allegations are an insufficient foundation on which to create more regulatory procedures.

¹¹ These companies include AT&T, Bell Atlantic Corporation, GTE Corporation, MCI Communications, Pacific Telesis Group, Rochester Telephone Corporation, Sprint Corporation, Time Warner, Inc., and U S WEST, Inc.

¹² CPR Institute for Dispute Resolution, CPR Corporate Policy Statement on Alternatives to Litigation, Registry of Subscribers (June 1997) <Internet: www.cpradr.org>.

determine anything other than disputed factual acts or omissions, and certainly not the legal consequences of such acts or admissions.¹³

The Commission recently amended its rules to authorize the Chief of the Common Carrier Bureau to designate factual disputes for evidentiary hearings before an ALJ, even in those cases where the facts to be determined may be considered novel.¹⁴ In this context, the Commission noted that the Enforcement Task Force was evaluating whether it would be appropriate to conduct mini-trials or some other form of live evidentiary proceeding, either before an ALJ or the Task Force in certain limited categories of disputes.¹⁵ The Commission envisioned that such procedures “would allow parties a substantially greater opportunity to present live testimony and oral argument than is contemplated by the hearings conducted pursuant to designation order.”¹⁶

In its recent Public Notice, the Commission states for the first time that mini-trials, rather than simply allowing parties a substantially greater opportunity to present live testimony and oral argument, would cover a broader range of issues than those hearings likely to arise from the Bureau’s newly expanded authority to designate issues for hearing before an ALJ.¹⁷ Although the Public Notice is too summary in nature to fully appreciate the scope of issues that would be

¹³ Complaint R&O at ¶135.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 138. Nowhere in the Complaint R&O, or in the earlier Notice of Proposed Rulemaking, did the Commission advocate the use of mini-trials as an alternative to the current formal complaint procedures.

¹⁶ *Id.*

¹⁷ Public Notice at 3.

covered by the accelerated procedures, it would appear that an expansion of the range of issues to be referred away from the Enforcement Bureau would not be justified. The Bureau is competent to resolve complaints that do not require a formal evidentiary proceeding. Where disputes cannot be resolved without resorting to formal evidentiary hearings, the Commission has already provided that issues can be designated for resolution to ALJs, and that such referral will not interfere with the Commission's duty to meet prescribed complaint resolution deadlines:

[T]he chief Administrative Law Judge would have the discretion to establish such expedited procedures and requirements as are necessary to receive documentary evidence, examine and cross-examine witnesses and prepare findings of fact within the timetables specified in any hearing designation order issued by the Commission or the staff pursuant to delegated authority.¹⁸

Mini-trials should therefore be considered one of the "expedited procedures and requirements" that may be helpful in preparing findings of fact within the timetables specified in any hearing designation order. The need for a mini-trial, as opposed to any other procedure or requirement, should be determined by the ALJ in consultation with parties as part of an initial conference with the ALJ following designation of the issues for hearing.

It is here that the Enforcement Task Force can perhaps best contribute to facilitating the timely resolution of disputes. With the expertise that the Task Force already has, and which it will undoubtedly continue to acquire, it can play an important consultative role with the ALJ and the parties at the initial post-designation order status conference. It can make non-binding recommendations to the parties as to the most effective expedited procedure or requirement to be

¹⁸ Complaint R&O at n.377 (noting that the administrative law judges were instrumental in achieving settlement of all designated pole attachment complaints before hearing).

employed to determine the designated evidentiary issues at hand. Any such procedure, whether it be a mini-trial or anything else, should be conducted before the ALJ as the ultimate arbiter of disputed facts, but the proceeding could certainly be facilitated and assisted by the Task Force. Of course, the Task Force could always make available to all parties a voluntary ADR opportunity through a variety of procedural devices.

IV. THE EFFECTIVENESS OF THE COMMISSION'S RECENT REFORMS SHOULD BE STUDIED BEFORE NEW RULES ARE PROPOSED OR ADOPTED.

The remainder of the Public Notice seeks comment on new rules that would apply to an Accelerated Docket in the areas of discovery and sanctions, settlement efforts, damages and pleadings. As stated above, there is simply no current demonstrated need for a hearing-style alternative to the Commission's formal complaint rules as described in the Public Notice. If facts are not in dispute, or if disputed facts can be easily resolved on the pleadings, the Commission is fully capable of rendering a rapid decision in light of its recently adopted procedural reforms. In more complicated cases the relevant Bureau can designate specific issues for hearing and an ALJ can determine whether or not mini-trials or other procedural alternatives should be employed to determine any disputed act or omission without jeopardizing the Commission's ability to decide a case within five months. There is thus no need to alter the Commission's current rules.

The Enforcement Task Force and the Enforcement Bureau should monitor the overall effectiveness of the new formal complaint rules in the course of the next year, and recommend necessary reforms in order to keep discovery as "targeted and focused as possible," to ensure that complaints are in fact initiating goodfaith settlement negotiations prior to filing complaints, and that recent procedural reforms comport with due process. Any sanctions that are not already

provided in the Commission's rules should be specifically proposed by the Commission in a Further Notice of Proposed Rulemaking.

If the Commission were to consider proceeding with a rulemaking to adopt new procedures, it should ensure that proceedings are placed on an Accelerated Docket only with the consent of all parties. Previously filed complaints should not be reassigned to the Accelerated Docket except upon mutual consent of the parties. Controlling discovery, encouraging pre-filing settlement efforts, and protecting proprietary information would seem to be of equal, if not more, importance with an Accelerated Docket as with an ordinary formal complaint.¹⁹

One of the most problematic aspects of a mandatory truncated mini-hearing procedure are the suggested procedural reforms. The idea that a defendant could be required to file a "speaking answer" within seven days of the filing of a complaint does not begin to comport with due process of law. To require production of documents with an answer would require substantial additional time. The twenty days permitted under the current formal complaint rules is likely to be the minimum that is consistent with due process. The impracticality of an arbitrary 60 day deadline is highlighted by the extreme pressure on the defendant that such a procedure would impose. The Complainant has up to two years to prepare its complaint under the statute of limitations. The defendant must be afforded a meaningful and reasonable opportunity to prepare and present a defense in what is most likely a highly complex and technical case.

¹⁹ Telephonic status conferences, joint submissions, hand delivery or facsimile service of pleadings, and bifurcation are reforms proposed for the Accelerated Docket that seem logical insofar as they have been recently established or affirmed under the current rules. Once again, however, the effectiveness of these should be analyzed before new reforms are proposed.

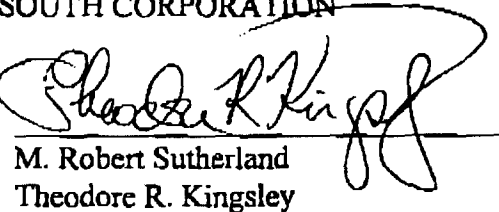
CONCLUSION

The Enforcement Task Force should study the effectiveness of the Commission's current procedural requirements and make any recommendations regarding any further procedural reform to the Commission based on this review. If the Task Force recommends that an Accelerated Docket as a hearing-type alternative to the current formal complaint process be established, this recommendation should be the basis of a Notice of Inquiry or a Further Notice of Proposed Rulemaking, so that an adequate record based on comments and reply comments can be developed. In the meantime, the Enforcement Task Force should be a part of voluntary dispute resolution efforts between carriers, and should consult with administrative law judges after complaints have been designated for hearing in order to advise on the procedure appropriate for determining the disputed facts at issue.

Respectfully submitted,

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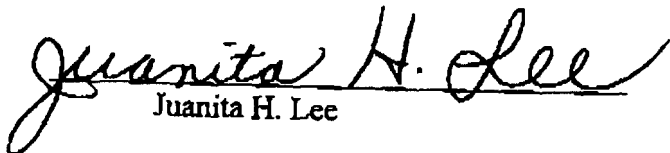
I do hereby certify that I have this 12th day of January, 1998, served all parties to this action with a copy of the foregoing **COMMENTS** by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed below.

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